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SERVICE DATE - NOVEMBER 9, 2001
SURFACE TRANSPORTATION BOARD
DECISION

STB Finance Docket No. 34090

UNION PACIFIC RAILROAD COMPANY – PETITION FOR DECLARATORY ORDER

Decided: November 7, 2001

In a petition filed on August 23, 2001, the Union Pacific Railroad Company (UP) seeks institution of a declaratory order proceeding and a finding that Salt Lake City, UT (City) cannot sever, or prevent operation over, a 1.32-mile UP line of railroad (the Line)¹ without first obtaining adverse abandonment authority under 49 U.S.C. 10903.² In its September 14, 2001 reply,³ the City argues that UP contractually agreed to remove the tracks over the street crossings at issue, an assertion which UP disputes. As discussed below, there is no need for the Board to institute a declaratory order proceeding because the issues presented are well settled.

MOTION TO CONSOLIDATE

Simultaneously with its September 14, 2001 reply, the City filed a notice of intention to file an adverse abandonment application in STB Docket No. AB-33 (Sub-No. 183)⁴ and a motion

¹ The track in dispute is a portion of UP's "900 South Line," which is located between milepost 781.0 and milepost 782.32.

² UP requests expedited action because the City, in an August 3, 2001 letter to UP (August 3 Letter), states that it is directing UP to remove its tracks from all crossings of city streets east of Redwood Road by November 1, 2001. See UP Petition for Declaratory Order, Exhibit 1 at 2. On September 6, 2001, the City responded that the expedited handling request should be denied because there is no urgent need for UP to use the Line and no action to physically impair use of the Line is imminent. This is inconsistent with the August 3 Letter. UP subsequently submitted two additional responses seeking expedited handling. To provide guidance, this decision is being issued as expeditiously as possible.

³ On September 12, 2001, the date its reply was due, the City filed a request for an extension of time to file a reply until September 14, 2001. The City has represented that UP has no objection to the extension. The request for an extension of time will be granted.

⁴ The City filed an amended notice of intent to seek adverse abandonment authority on October 12, 2001.

to consolidate this proceeding with the anticipated adverse abandonment proceeding.⁵ The two proceedings, however, are procedurally incompatible. First, abandonments are governed by strict procedural rules, see 49 CFR 1152, that do not apply to proceedings addressing requests for declaratory order. Second, a decision in this proceeding must necessarily precede the adverse abandonment proceeding, as it addresses whether an adverse abandonment proceeding is required. Third, the factual and legal issues necessary to determine whether the Line should be authorized to be abandoned are not presented in this proceeding. Finally, this proceeding may be decided on the present record, while the City's anticipated adverse abandonment application has not yet been filed. Therefore, the motion to consolidate will be denied.

BACKGROUND

In 1906, the Line was constructed to link a then-new UP passenger depot in downtown Salt Lake City to UP's main line to Los Angeles, CA. In so doing, the Line became a part of an important freight route and major main line used by passenger, mail and express trains between Salt Lake City and Los Angeles. Over time, the use of the Line has changed and diminished. In 1971, passenger service was transferred to the National Railroad Passenger Corporation, which rerouted its service away from the Line in the mid-1980s. By the 1990s, many of the on-line shippers had converted to truck transportation or left the area. By then, the only service consisted of a daily local train serving the Line's remaining customers and nearby trackage. The Line also continued to be used by trains seeking an alternate through-route.

In 1997, UP agreed to cooperate with the City on a project designed to facilitate a major commercial and residential development in the area near the Line by rearranging track through the downtown area and the area known as Grant Tower, immediately north of the Line. According to UP, it initially planned to abandon the Line, but ultimately limited its abandonment filing to a contiguous 0.47-mile segment of the 900 South Line. See Union Pacific Railroad Company—Abandonment Exemption—in Salt Lake County, UT, STB Docket No. AB-33 (Sub-No. 116X) (STB served Sept. 30, 1998). UP explains that it retained the Line so that the Line could form part of a freight bypass route between UP's Roper Yard and its main line track to the Los Angeles/Oakland Bay area.⁶ No trains have operated over the Line since March 1999.

UP states that its decision to reactivate the Line is related to the 2002 Winter Olympics and is designed to allow approximately 8-10 trains per day to be routed away from the Olympic event sites. UP submits that the project is also being pursued for its long-term transportation benefits, which are reduced transit time and reduced congestion on the UP route through the Grant Tower area. In response to UP's statement of intent to reactivate the Line, the Honorable

⁵ UP replied to the motion to consolidate on September 27, 2001.

⁶ According to UP, this alternate route will be possible once it builds a connection to an intersecting main line.

Ross C. Anderson, Mayor of the City, sent the August 3 Letter to UP purporting to exercise the City's option, under a Franchise Agreement dated March 20, 1989 (the Franchise Agreement), to void and terminate that agreement and UP's rights to use street crossings on the Line and directing UP to remove its tracks at such crossings by November 1, 2001.

In response to the City's actions, UP filed the instant petition for declaratory order. UP states that the City's attempt to void its rights under the Franchise Agreement to use street crossings, and to direct removal of UP's tracks at these crossings, if carried out, would sever the Line and prevent rail operations over it. UP argues that, under 49 U.S.C. 10903, the City cannot take any action to sever a line of railroad, or prevent its reactivation, without first obtaining adverse abandonment authority from the Board.

The City contends that the Franchise Agreement allows it to require removal of UP's tracks over street crossings on the Line. The City argues that UP agreed to such removal if it failed to use the Line for 9 consecutive months and the City terminated the Franchise Agreement. The City believes that these conditions have been met and that UP is obligated to take whatever regulatory steps are necessary for such removal, including seeking authority to abandon the Line.⁷

UP contests the City's interpretation of the Franchise Agreement and seeks a declaratory order that the City may not interfere with UP's reactivation and operation of the Line without obtaining adverse abandonment authority under 49 U.S.C. 10903. In essence, UP argues that the Board has exclusive jurisdiction over the Line until abandonment is authorized and exercised and that enforcement of the Franchise Agreement by the City requiring removal of track on the Line is preempted.

DISCUSSION AND CONCLUSIONS

Under 5 U.S.C. 554(e) and 49 U.S.C. 721, the Board may issue a declaratory order to terminate a controversy or remove uncertainty. It will not be necessary for the Board to institute a declaratory order proceeding here, however, because it is well settled that, without abandonment authority from the Board, a state or local order, regulation or civil enforcement action that would sever a line of railroad or prevent operation over it is precluded. See 49 U.S.C. 10501(b), 10903.

Congress gave the Board exclusive and plenary authority over rail line abandonments, and Board authority is required before a railroad line can be lawfully abandoned. Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 319-21 (1981); Phillips Co. v. Denver and Rio Grande Western R., 97 F.3d 1375 (10th Cir. 1996), cert. denied, 521 U.S. 1104 (1997). The courts have been clear that "[a]bsent . . . valid . . . abandonment [authority] . . . a state may

⁷ According to UP, the City has filed a lawsuit in Federal district court relating to the matter.

not require a railroad to cease operations over a right-of-way.” National Wildlife Federation v. ICC, 850 F.2d 694, 704 (D.C. Cir. 1988) (citing New Orleans Terminal Co. v. Spencer, 366 F.2d 160 (5th Cir. 1966) (New Orleans Terminal)). Thus, any party seeking the abandonment of a line of railroad, or discontinuance of rail service, must first obtain appropriate authority from the Board. See Consolidated Rail Corp. v. ICC, 29 F.3d 706 (D.C. Cir. 1994).

The City’s actions are admittedly to prevent reactivation of,⁸ and operation over, the Line. The City argues that the Franchise Agreement allows it to terminate UP’s franchise rights with respect to the right-of-way and require UP to remove its tracks. Yet, even assuming that the City’s interpretation of the Franchise Agreement is correct, its enforcement of the Franchise Agreement is no less an attempt to regulate the abandonment of an interstate line of railroad than if the City promulgated laws for the same purpose.⁹ The Board and the courts have consistently held that such local regulation is precluded. In New Orleans Terminal, 366 F.2d at 163-64, the court found unenforceable a Parish ordinance directing the Parish attorney to take action, by suit, or otherwise to compel the removal of rail street crossings. Similarly, in Des Moines v. Chicago & N.W. R. Co., 264 F.2d 454, 457-60 (8th Cir. 1959), the court found that the city could not, by suit, oust a railroad from use of city streets upon “forfeiture” of a “grant” and “contract” without abandonment authority.

In short, the abandonment of a line of railroad may occur only if authorized by the Board. See 49 U.S.C. 10903; 49 CFR 1152. In its reply, at 6, the City appears to recognize that the appropriate procedure for it to seek removal of the street crossings on the Line is to file an application for adverse abandonment. In fact, the City has filed a notice of its intention to do so. See Salt Lake City Corporation – Adverse Abandonment – in Salt Lake City, UT, STB Docket No. AB-33 (Sub-No. 183) (filed Oct. 12, 2001).

Finally, UP expresses concern that the City will attempt to interfere with reactivation of the Line through lengthy and onerous local permitting, zoning or environmental regulations and UP requests that the Board issue guidance on the matter. Based on the discussion above and the City’s notice of its intention to file an adverse abandonment application, there is no reason to

⁸ Reactivation of service over a rail line that has not been abandoned does not require Board approval. See Lee’s Summit, MO v. STB, 231 F.3d 39, 42-43 at n.3 (D.C. Cir. 2000); Detroit/Wayne County Port Authority v. ICC, 59 F.3d 1314, 1316-17 (D.C. Cir. 1995); Union Pacific Railroad Company – Petition for Declaratory Order – Rehabilitation of Missouri-Kansas-Texas Railroad Between Jude and Ogden Junction, TX, STB Finance Docket No. 33611 (STB served Aug. 21, 1998).

⁹ In Thompson v. Texas Mexican R. Co., 328 U.S. 134, 147 (1946), the Supreme Court found that a contract, whether expired by its terms or terminated by operation of an escape clause, could not affect the ICC’s power. The Court went on to state that “[u]ntil abandonment is authorized, operations must continue.” Id.

believe that the City will seek removal of the tracks by anything other than lawful means. In any event, court and agency precedent addressing the scope of 49 U.S.C. 10501(b)¹⁰ has made it clear that, under this broad preemption regime, zoning ordinances and local land use permits are preempted and state and local regulation cannot be used to veto or unreasonable interfere with railroad operations. See, e.g., Norfolk S. Ry Co. v. City of Austell, No. 1:97-cv-1018-RLV, 1997 U.S. Dist. LEXIS 17236, at *17 n.6 (N.D. Ga. Aug. 18, 1997); Village of Ridgefield Park v. New York, Susquehanna & Western Ry, 750 A.2d 57 (N.J. 2000); Auburn & Kent, WA – Pet. for Declar. Order – Stampede Pass Line, 2 S.T.B. 330, 338 (1997), aff’d, City of Auburn; Joint Petition for Declaratory Order – Boston and Maine Corporation and Town of Ayer, MA, STB Finance Docket No. 33971 (STB served May 1, 2001, and Oct. 5, 2001); Friends of the Aquifer, et al. – Declaratory Order, STB Finance Docket No. 33966, slip op. at 4 (STB served Aug. 15, 2001). Thus, there is no need for the Board to issue additional guidance through a declaratory order proceeding at this time.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The City’s petition for an extension of time to file a reply is granted.
2. The City’s motion to consolidate STB Finance Docket No. 34090 and STB Docket No. AB-33 (Sub-No. 183) is denied.
3. Petitioner’s request for a declaratory order proceeding is denied and this proceeding is terminated.

¹⁰ In the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (1995), Congress broadened the express preemption provision at 49 U.S.C. 10501(b), so that both the jurisdiction of the Board over transportation by rail carriers and the remedies provided under 49 U.S.C. 10101-11908 are exclusive and preempt the remedies provided under Federal or state law. 49 U.S.C. 10501(b). See City of Auburn v. STB, 154 F.3d 1025, 1029-31 (9th Cir. 1998), cert. denied, 527 U.S. 1022 (1999) (City of Auburn).

4. This decision is effective on December 9, 2001.

By the Board, Chairman Morgan, Vice Chairman Clyburn, and Commissioner Burkes.

Vernon A. Williams
Secretary